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LAW AND SOCIAL PROGRESS.¹

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The great defect in our liability law¹ is that it does not do the work for which it was intended. Indeed there are few topics on which a more unanimous public opinion exists than that there are defects in the present law of employers' liability. Judging the present employers' liability laws in the United States by their results in action, we could very much better describe them as "employers' immunity laws."

The question, fundamentally, that we have to deal with is one of fixing responsibility for proper social, industrial and working conditions. It is a difficult matter to define responsibility, whether the responsibility of the employer or of the employee, in so complicated a relationship as that which exists between employers and employees. The old English common law fixed that responsibility very definitely, very simply and very directly, and it worked well at the time that the common law liability rule was formulated. I suppose to-day there is no department of legislation and no field of legal activity in which we see the relationship between existing social conditions and abstract rules at such great disadvantage as we do in the present condition of those rules and those laws which, taken collectively, make up what we call our employers' liability law.

At times we may be tempted to look upon the law as an abstract rule of justice—lawyers usually, and many judges constantly, do that,—and there is a certain body of law which can be so interpreted, but that is not the body of law with which we are to deal at this meeting. We are to consider a body of law which tries to fix responsibility, defining the duties and rights of parties in a relationship—namely, that of employer and employee—which must be adjusted to current economic changes and conditions, and that is precisely what our present law does not do, and all students of the

¹Opening address as presiding officer, third session of the annual meeting of the Academy, April 8, 1911.

subject are in substantial agreement that it does not. When the Court of Appeals in New York handed down its opinion, a few days ago, in respect to the attempt of the Legislature of New York to formulate a new rule of action, the Court expressed itself as in full sympathy with the effort to revise and remodel our employers' liability law. It decided, it is true, in a very narrow spirit, and by what to my mind was entirely an unnecessary legal argument, and one which I believe other equally distinguished judges are not likely to follow, that the economic conditions and social philosophy of our own day have nothing to do with the constitutional guarantees of property under which **employers** and employees may contract to carry on their work in the state of New York. It is precisely the reverse of that proposition upon which the old common law rule of employers' liability was built up. The English courts formulated the law of liability upon a consideration of the economic conditions and social changes of their time, and it is very unfortunate indeed, if we must take the view of the New York Court of Appeals, that we must consider our conditions static and fixed for all time by the constitutional guarantees interpreted absolutely as abstract principles until they are formulated anew through constitutional amendment every time they come in conflict with the consensus of public opinion. However, the decision of the Court of Appeals for the State of New York is now the law for that state, and should the Supreme Court of the United States render a similar decision, that would be the law for the United States.

Such decisions place the responsibility back upon the people to formulate in ways that are open to them, the rules of law that they wish to enact, and wish to see enforced by the courts. In other words, it is not a hopeless situation. The courts are amenable to law and the people make the law, and it is precisely for that reason that, at a meeting like this, the Annual Meeting of the Academy, we are fulfilling a useful function and a timely one in devoting all of the sessions, practically, to a single topic, and facing squarely and in the spirit of free scientific discussion the great question of how our economic and social conditions may be better embodied in our law, and make our law accomplish the ends of justice under the economic and social conditions of our own day.